IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 367

UNITED STATES OF AMERICA,

Appellant,

v.

CONTINENTAL CAN COMPANY, INC. AND HAZEL-ATLAS GLASS COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR CONTINENTAL CAN COMPANY, INC.

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Question Presented.

The sole question presented for decision on this appeal is this:

> Was the district court correct in dismissing a complaint charging a violation of Section 7 of the Clayton Act when, on completion of the government's case, the record was absolutely barren of evidence of actual or reasonably probable lessening of competition or tendency to create a monopoly in any line of commerce as a result of the acquisition in question?

Statement.

This is a direct appeal from the judgment of the district court holding that the acquisition of Hazel-Atlas Glass Company (Hazel-Atlas) by Continental Can Company, Inc. (Continental) did not violate Section 7 of the Clayton Act, 15 U. S. C. §18.

The government's complaint was dismissed by the district court because of a failure of proof of either actual anti-competitive effects flowing from the acquisition, or reasonable probability that the forbidden anti-competitive effects would result in the future, in any line of commerce.

The Acquisition.

Continental acquired all of the assets and assumed all of the liabilities of Hazel-Atlas on September 13, 1956. Since that date the acquired business has been operated by Continental. Hazel-Atlas was dissolved late in 1956.

Prior to the acquisition, Continental's principal business was the manufacture and sale of metal cans and other metal containers. Other products included paper cups and plates, fibre drums, kraft linerboard, flexible packaging materials, crown caps, vacuum type metal caps, plastic containers and can closing machinery (Op. R. 1583).[1] It did not manufacture or sell any glass products or other products manufactured or sold by Hazel-Atlas (Op. R. 1585).

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[1] The following abbreviations are used:

"R"—printed record
"Tr"—original transcript
"GX"—government's exhibit
"DX"—defendant's exhibit
"Gov't Brief"—brief filed for the United States
"Op."—opinion of the district court

Continental was formed in 1913. In common with many American corporations it grew over the years by both internal growth and outside acquisitions.

The district court considered the evidence relating to prior acquisitions and found:

> "Many of the acquisitions were made a number of years ago in the 1920's and the 1930's. Many were extremely small. Some were the result of liquidation sales. Some appear to have been cleared with the Department of Justice or to have had its tacit approval. Some were located in Canada. Some of the companies acquired were subsequently sold.
>
> "None of the companies acquired in the ten years prior to suit were can companies. No glass company had ever been acquired before." (Op. R. 1610).

The government does not challenge these findings, and, in any event, it is clear that these ancient transactions, made by men long since dead, under different economic and legal conditions than those now prevailing, can have no relevance to the acquisition in question.

The government does present in its brief (Gov't Brief pp. 5-6) a highly distorted statement of Continental's history, concocted from material not in the record. It is, we submit, without evidentiary value.

Hazel-Atlas was a company manufacturing and selling glass containers both for home and commercial use, glassware, including tumblers, tableware and kitchenware, some types of metal closures for glass containers and miscellaneous items (Op. R. 1584). It did not manufacture or sell metal containers or any other product made or sold by Continental (Op. R. 1585).

The Proceedings Below

When the proposed acquisition was announced in the summer of 1956, the government attempted to stop it by invoking an existing consent decree to which Continental was a party.[2] When the district court which had entered that decree held that it did not apply to the proposed acquisition,[3] the government obtained the voluntary agreement of the companies to postpone the acquisition until the government could apply for a temporary restraining order. Shortly thereafter a complaint charging violation of Section 7 of the Clayton Act was filed in the District Court for the Southern District of New York, and application was made by the government for a temporary restraining order. This application was denied on September 13, 1956, and thereupon the acquisition was completed.

The action was continued as an action for divestiture. Extensive pre-trial proceedings, involving both elaborate discovery and pretrial conferences, were conducted. The case went to trial in June, 1960, almost four years after the challenged acquisition had been consummated. The government presented its case in a trial lasting six weeks, during which it called numerous witnesses, took over 4,000 pages of testimony and introduced hundreds of exhibits, among which were elaborate statistical computations. With very few exceptions everything the government offered was admitted in evidence. The government does not complain of the exclusion of the few items offered which were not admitted.

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[2] The government erroneously identifies this decree as having been entered in *United States* v. *Hartford-Empire Co.* (Gov't Brief, p. 3 n. 2). Actually it was entered in *United States* v. *Continental Can Company*, Civil No. 26346 (N. D. Cal. 1950). Continental was not a party to the *Hartford-Empire* case.

[3] *United States* v. *Continental Can Company*, 143 F. Supp. 787 (N. D. Cal. 1956).

On the conclusion of the government's case Continental moved for a dismissal of the complaint under Rule 41(b) of the Federal Rules of Civil Procedure.

The district court, correctly applying Rule 41(b), proceeded to evaluate the evidence to determine whether on the facts presented the government was entitled to relief. Finding that it was not, the court orally announced its decision to dismiss the complaint.

This Court decided *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962) before the district court completed the preparation of its written opinion, findings of fact and conclusions of law. Very shortly after the *Brown Shoe* decision was rendered, the government requested, and received permission to file with the district court an additional brief discussing the applicability of *Brown Shoe*. This was done and appellee responded. Judgment dismissing the complaint was entered on April 16, 1963.

The district court's opinion, reported at 217 F. Supp. 761, covers 44 printed pages. Each of the government's contentions was carefully analyzed and comprehensive findings were made with the greatest of care. Scrupulous attention was given to the teachings of *Brown Shoe* and other relevant decisions of this Court.

The district court found no fault with the legal theories advanced by the government. It based its conclusions squarely on the finding that the evidence showed no actual anti-competitive effects from the four-year old acquisition[4] and showed nothing from which it could be concluded that there was a reasonable probability that the forbidden anti-competitive effects would develop in the future. The com-

[4] By the time the complaint was dismissed, the acquisition was almost seven years old, but the trial was held four years after the event.

plaint, in short, was dismissed because the government failed to support its allegations with proof.

The Government's Brief

The government's brief attempts to plug up the gaping holes in the record that it fashioned in this case by liberal citations of alleged facts from two books (apparently graduate students' theses), neither of which was offered in evidence or subjected to the process of cross examination in the district court. The government calls these alleged facts "undisputed conclusions" reached by commentators. (Gov't Brief p. 26). The only reason they were undisputed, of course, was because the government did not see fit to expose their authors to the traditional process of cross examination.

The first of these sources relied upon by the government is a man named Hession, who wrote his doctor's thesis under the title "Competition In The Metal Food Container Industry 1916-1946". Although the government calls it the "leading work on the industry" (Gov't Brief p. 6 n. 6), it has apparently never been printed. The only copy we were able to find is in type-script.

Ironically enough, the name of Hession was on the government's witness list for the trial[5] but for reasons never explained he was not called to testify and it was therefore not possible to demonstrate in the courtroom his virulent bias against Continental. Some of it, however, shows through in his work as, for example, in his preface in which, after complaining of his difficulty in extracting information from the industry, he gives credit for cooperation to the principal competitors of Continental but

[5] Letter, dated March 8, 1960, from Robert A. Bicks, Acting Assistant Attorney General, Antitrust Division, Department of Justice, to Helmer R. Johnson (unprinted).

pointedly omits that company, the reason, obviously, being that Continental's executives had not cooperated with him as he thought they should.[6]

His statements, presented to this Court outside of the record, must be ignored if the principle of establishing facts by adversary proceeding is to continue to have meaning.

The second "witness" proffered by the government outside the record is a man named McKie who wrote his thesis under the title "Tin Cans and Tin Plate". In his work he admits to a heavy reliance on Hession, and his "facts" are no more reliable.

We are not here complaining of references to writings of recognized authorities dealing with undisputed matters of fact. We do, however, ask this Court's protection against the attempt to use unseen, palpably prejudiced writings on controversial issues as a source of "fact." (See *Reilly* v. *Pinkus*, 338 U. S. 269 (1949); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937)).

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[6] An example of the style of this "scholar" is found in the discussion introducing the material cited in the government's brief (Gov't Brief p. 5 n. 5); where, in describing an early president of Continental, Hession says:

> "Mr. Conway, an ex-piano salesman who had married into the family which held the controlling stock interest in Continental, had the aggressive, promoter type of personality which this ambitious program of aggrandizement required. The stock market boom of the late Twenties greatly facilitated his operations by permitting him to issue new shares of stock to a security-hungry public and thus finance the purchases."

Summary of Argument.

I.

The district court properly applied the "line of commerce" tests formulated by this Court.

The tests laid down by this Court for determining lines of commerce in which to measure the effect of an acquisition for the purposes of Section 7 of the Clayton Act are these: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." There may be submarkets within an outer market, depending on such "practical indicia" as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (*Brown Shoe Co.* v. *United States*, 370 U. S. 294, 325 (1962)).

The fact that it may be technically possible to use a product for more than one purpose does not, standing alone, satisfy any of these tests.

In actual usage, for products other than beer, there is neither reasonable interchangeability nor cross-elasticity of demand between glass containers and metal containers. Products tend to move predominantly in one type of container or the other, depending on price, physical characteristics of the product, tradition, packing processes, type of market and many other factors.

Applying the market definition tests laid down by this Court, the district court found an interindustry line of commerce consisting of both glass and metal containers

for beer, and, at the same time, found no line of commerce consisting of glass and metal containers generally, or of glass and metal containers for the canning of food. The district court's findings negating the existence of these two claimed lines of commerce are supported by an overwhelming body of evidence, and are clearly correct.

II.

The district court was correct in finding that there was no evidence of reasonable probability of anti-competitive effects resulting from the acquisition.

The effect of an acquisition on competition must be measured in terms of reasonable probability, and the district court found no reasonable probability of anti-competitive effects from the acquisition of Hazel-Atlas by Continental. This finding was clearly correct. The government offered no evidence of probable anti-competitive effect and the record contains none.

III.

The government's statistics are unreliable and provide no basis for measuring shares of any market.

The statistics which the government uses in an attempt to show the market participation of companies selling containers for use in food canning are demonstrably false. They themselves demonstrate that it is impossible to combine figures for two dissimilar markets and come out with any meaningful result.

ARGUMENT.

I.

The district court properly applied the "line of commerce" tests formulated by this Court.

The threshold question in any Section 7 case is the delineation of the relevant market or line of commerce—"a necessary predicate to a finding of a violation of the Clayton Act." (*United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586, 593 (1957)). In the court below, the government claimed that there were ten pertinent lines of commerce.[7] In this Court, the government has abandoned nine of the ten and come up with an eleventh. The new one is what it denominates "the production and sale of containers used for all purposes for which metal or glass containers may be used"[8] (Point I of the government's brief). The only one of the original ten claimed lines of commerce which the government is seeking to defend is "containers for the food canning industry" (Point II of the government's brief).

The fact that the government never asserted its eleventh line of commerce in the district court should be enough for this Court to refuse to consider the government's principal argument on this appeal (Point I). Section 7 cases, after

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[7] 1. Containers for the canning industry. 2. Containers for the beer industry. 3. Containers for the soft drink industry. 4. Containers for the toiletries and cosmetics industry. 5. Containers for the medicine and health industry. 6. Containers for the household and chemical industry. 7. The can industry. 8. The glass container industry. 9. Metal closures. 10. The packaging industry.

[8] Gov't Brief p. 18.

all, are essentially factual inquiries, and this Court does not try them *de novo*. In any event, the government's argument is demonstrably without merit.

The government calls attention (Gov't Brief p. 15) to the statement in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 303 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954) that "the problem of defining a market turns on discovering patterns of trade which are followed in practice." We agree with that statement and so did the district court, for that is exactly the approach taken by it. The government's only complaint is that it doesn't like what the district court discovered.

The government seeks to create the impression that this case raises the question of whether Section 7 is applicable to "interindustry" mergers. No such issue is presented here.

It has never been contended in this case that Section 7 is not applicable to interindustry mergers if the tests laid down by this Court for determining a line of commerce are met and the effects prohibited by the statute are found.

The district court clearly recognized that. It did not dismiss the complaint on any theory that interindustry mergers are necessarily lawful. It dismissed because of failure of proof that this particular interindustry merger was unlawful.

Any contention that the district court was laboring under a misconception on this score is clearly negated by the court's treatment of the government's beer container line of commerce. The court specifically found that there was *prima facie* evidence warranting the inclusion in a single line of commerce of metal and glass containers for beer, even though the containers were products of different industries. This finding was made because, in the

judgment of the district court, the evidence as to beer containers satisfied the market definition tests laid down by this Court (see *infra*, p. 17).[9] But, applying the same tests, the district court found that the other interindustry lines of commerce advanced by the government were not sustained by proof. In short, the law was applied by the court below to the facts of record. That the findings of fact were not to the government's liking does not mean that the court misconceived the law. Nor does it mean that this Court should try factual issues *de novo*. "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants." (*United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341 (1949). See also, e.g., *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 331-32, 339 (1952)). As Mr. Justice Douglas said in *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 496 (1950): "... our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

The test for determining a relevant market for Clayton Act purposes, as formulated by this Court in *duPont-General Motors*,[10] is whether products possess "sufficient peculiar characteristics and uses to constitute them sufficiently distinct" from one another to make them separate lines of commerce.

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[9] The government misstates the position of the district court when it says that it was that court's view that "physically dissimilar products cannot usually be in the same relevant market for antitrust purposes" (Gov't Brief p. 38 n. 38). That this was not the view of the district court is shown by its holding that physically dissimilar bottles for beer and metal containers for beer were in the same line of commerce.

[10] *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586, 593-94 (1957).

The formulation of this rule was foreshadowed in earlier cases. In *Times-Picayune*,[11] a Sherman Act case, the Court said:

> "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small. Useful to that determination is, among other things, the trade's own characterization of the products involved."

The same principle was applied a few years later in the *Cellophane* case:[12]

> "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. For example, one can think of building materials as in commodity competition but one could hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different. This is the interindustry competition empha-

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[11] *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 612 n. 31 (1953). Cf. Hale and Hale, *Market Power: Size and Shape Under the Sherman Act* (1958), frequently cited by the government in its brief (Gov't Brief p. 16 n. 14, p. 17 n. 17, p. 20, n. 19, p. 38 n. 37), at 284:

> "In the last analysis, substitution is a question of degree, since almost every service or product competes against every other. It has often been remarked, for example, that consumers have preferred to buy new automobiles rather than improve their housing conditions."

[12] *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 393 (1956).

> sized by some economists. See Lilienthal, Big Business, c. 3."

One year after *Cellophane* the issue of market definition reached this Court in an antimerger action under original Section 7 of the Clayton Act in *duPont-General Motors*.[13] It was there that the Court articulated as the governing criterion the "peculiar characteristics and uses" test, which is essentially a verbal variation of *Cellophane's* doctrine of reasonable interchangeability:

> "The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act."[14]

The rule was next applied by this Court in *International Boxing*.[15] There the district court had held that the defendants had monopolized trade in championship boxing contests in violation of Section 2 of the Sherman Act, rejecting their defense that the appropriate market consisted of the entire entertainment field or at the very least the promotion of all boxing contests. In this connection, the district court had found that a particular and special demand existed for championship bouts in contradistinction to the non-championship variety and other sporting events, public shows, spectacles and entertainment. This Court affirmed, holding that the trier of facts was warranted in concluding that championship boxing was not reasonably interchangeable for the same purposes with non-championship contests

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[13] *United States* v. *E. I. duPont de Nemours & Co.*, 353 U. S. 586 (1957).

[14] Id. at 593-94.

[15] *International Boxing Club* v. *United States*, 358 U. S. 242 (1959).

(and, *a fortiori* with other forms of entertainment)—price, use and qualities considered. That the market would have been the same in a Section 7 case is abundantly apparent from this Court's further observation,[16] citing *duPont-General Motors*, that by analogy championship boxing "bears those sufficiently 'peculiar characteristics' found in automobile fabrics and finishes such as to bring them within the Clayton Act's 'line of commerce.'"

The standards of *Times-Picayune, Cellophane, duPont-General Motors* and *International Boxing* were synthesized in *Brown Shoe*.[17] Here this Court considered both the outer boundaries of a product market and the submarkets within the broad market. With respect to the former it said:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[18]

It then went on to indicate some of the "practical indicia" for determining submarkets, listing

> "... industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities,

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[16] Id. at 252 n. 8.

[17] *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962). In this case there was no discussion, for example, as to whether canvas footwear should be included in the line of commerce. Notwithstanding the fact known to everyone that canvas footwear may sometimes serve as a substitute for leather footwear, the former was without discussion excluded from the product market in which wearing apparel shoes were under consideration. Id. at 300 n. 4.

[18] Id. at 325.

distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[19]

In defining the pertinent lines of commerce in this case, the district court scrupulously applied the tests established by the decisions of this Court and made detailed findings of fact fully supporting its market definitions.

Each of the ten lines of commerce originally proposed by the government was considered in minute detail by the district court. It found that only three of them—glass containers, metal cans, and containers for beer—did, in fact, constitute separate lines of commerce.

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[19] Id. at 325. The consistent application of the rule was continued in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 356-57 (1963), which was decided after judgment was entered in the district court in this case.

It is of more than passing interest to note the government's espousal of the "characteristics and uses" test in its brief in *United States* v. *Aluminum Company of America and Rome Cable Corporation*, Docket No. 204, this Term. In its brief it argues:

> "Aluminum and copper wire and cable are made of metals having entirely different physical and electrical properties and wholly unrelated supply and price patterns * * *. These factors determine the electrical uses to which the metals can be put. By virtue of their peculiar properties, aluminum and copper conductors have developed distinctive end uses —aluminum, both bare and insulated, as an overhead conductor, and copper as an insulated conductor for underground, indoor and other enclosed wiring, applications in which aluminum's brittleness and larger size render it impractical * * *. In overhead transmission and distribution, fields in which aluminum is physically interchangeable with copper, the price differential between the two metals dictates the use of aluminum. And, as we have noted, there is no responsiveness between the price of aluminum conductor and that of copper conductor. It is only in a most restricted sense, then, that aluminum and copper compete with one another as electrical conductors. It follows that aluminum conductor, like aluminum insulated, is an appropriate 'line of commerce' in which to appraise the effect of the merger on the structure of competition." (Brief for Appellant, pp. 47-48, *United States* v. *Aluminum Company of America and Rome Cable Corporation*, Docket No. 204, this Term).

As noted above, that the district court clearly understood and properly applied the criteria specified by this Court for determining lines of commerce and appraising competition between products, whether in the same industries or in different ones, is demonstrated by its findings with respect to beer containers. Here the district court evaluated the evidence and found that a *prima facie* showing had been made that glass containers for beer and metal containers for beer constituted a single line of commerce notwithstanding the fact that they were made and sold by different industries. This finding was based on evidence which the district court considered to show "virtual interchangeability of use and cross-elasticity of demand between the two types of containers used for this purpose" [i.e., beer] (Op. R. 1629). Having found such a line of commerce, the district court proceeded to evaluate the effect of the acquisition in it and found no reasonable probability that the acquisition would adversely affect competition in that line of commerce (Op. R. 1631-33). The district court's opinion plainly shows that the same methodology was followed with respect to every other line of commerce claimed by the government, including its alleged "interindustry" lines, and, specifically, metal cans for food and glass containers for food.

The evidence on the question of whether metal cans and glass containers can be forced into the same product market can best be summarized in terms of the "practical indicia" referred to in *Brown Shoe*.[20]

Industry and public recognition

The can industry and the glass container industry are separate and well defined. Each has its own trade association and the Bureau of Census collects statistics

[20] 370 U. S. at 325.

relating to them separately (R. 419, 903; GX 800, R. 2867-84, 1490; GX 801, R. 2962-66, 1489). The business world and the public recognizes them as separate industries and markets. There are no combined statistics available (R. 1281).

The product's peculiar characteristics and uses

Cans and glass containers are made of different materials and have different physical characteristics (Op. R. 1586, 1588). While in some instances it may be physically possible to package products in either type of container, other forces, including tradition, weight, price, attractiveness and many others determine which container is customarily used (Tr. 665, unprinted, R. 452, 472, 957-58). This was graphically demonstrated by the estimates of the government's own expert (R. 900-01, 951-53, 954-55; DX-N, R. 3389-92, 935).

Unique production facilities

Can and glass container manufacturing equipment is not interchangeable (DX-K, R. 2478, 3389, 569). From the user's point of view it is not feasible to use a canning line designed for packing a product in cans to pack a product in glass containers or vice versa (R. 306, 467-68, 476-78).

Distinct customers

There was no evidence to show that purchasers of metal cans or glass containers, or both, fall into any categories of distinct classes of customers (Op. R. 1643). The purchasers do not pack the same product in different containers (DX-N, R. 3389-92, 935).

Distinct prices

Glass containers and cans are priced separately. The prices of cans are determined principally by the price of tinplate; those of glass containers principally by the cost of labor (R. 146, 167-68, 410-11). Glass

and can manufacturers do not equalize freight with containers of a type which they do not manufacture (Tr. 233, unprinted, R. 58, 146, 169, 185, 281). Glass and can manufacturers do not reduce their regularly quoted prices to meet the lower price of containers of a type which they do not manufacture (Tr. 247, unprinted, R. 146, 185, 281, 384, 394).

Sensitivity to price changes

Prices of one type of container (except, perhaps, beer containers—Op. R. 1629) are not changed in response to price movements of the other type (R. 146, 185, 281, 384, 394). Manufacturers of one type of container frequently do not even know the price at which the other type of container is being sold (R. 384, 394). Buyers do not shift their purchases from one type of container to the other because of changes in the price differential between the two. (See, *e.g.*, quotations *infra*, pp. 20-22).

Specialized vendors

Can manufacturing companies sell cans and glass container companies sell glass containers. Sales are normally made directly to users (R. 383-84). The evidence gives no hint of the existence of jobbers or wholesalers who sell both cans and glass containers, and the reason, of course, is that such persons could not be found.

Against this evidence the government still contends that cans and glass containers are somehow in the same product market. In support of this contention it says that the two types of containers are "functionally interchangeable" (Gov't Brief p. 26). By this it apparently means that it is sometimes physically possible to use the two types of containers for the same end purposes. This argument deliberately avoids consideration of all of the characteristics of

each type of container which make impractical or uneconomical their interchangeability in actual usage. The argument gives no recognition to the realities of the market place.

A test of substitutability in terms of "functional interchangeability" is not and cannot be the same as a market test based on *reasonable* interchangeability or cross-elasticity of demand. Products may be functionally interchangeable when it is unimaginable that they could be so economically or practicably interchangeable as to reflect cross-elasticity of demand. Many instances immediately come to mind. Gold, for example, will perform many of the same functions that steel will and so is functionally interchangeable, but there is no market cross-elasticity between the two. Silver can often be substituted for copper in electrical installations, and actually was so substituted in some instances during the war. Yet under normal market conditions there is no market cross-elasticity between the two. In order to evaluate market cross-elasticity, examination must be made of economic limitations; market factors, such as consumer acceptance and tradition; practical limitations; and actual usage.

The market studies on which the government relies, so far from proving that the two types of containers are interchangeable, demonstrate how separate they really are. Consider some of the conclusions of these studies:

> "It takes many varied attributes to make a good container material. Each container material excels in certain attributes. Each has certain products for which it is the best adapted container material." (GX 33, R. 1744, 950).

> "The closure cost of the jar makes the glass package more expensive for Processed Foods." (GX 400A, R. 2531, 722).

"Our Baby Food can prices as compared to glass would seem to offer sufficient attraction to the packer to use tin, but here the consumer preference for glass controls the package used and the packer is somewhat indifferent because his price in glass more than compensates for the increased cost of that package. This probably will not change until the housewife becames more price conscious." (GX 400A, R. 2532, 722).

"Vacuum Packed Coffee—While the cost to the packer of the glass container is less, apparently packer, distributor, and consumer preference for tin outweighs this price consideration." (GX 400A, R. 2532, 722).

"The price of the container to the packager is not a dominant factor in the selection of either glass or metal. In the small sizes, metal cans are competitive costwise, but currently lack consumer acceptance. In the large size market the glass jar has, up until the present, been unsuccessful in making any significant inroads at prevailing price ratios to metal. It, therefore, follows that a price reduction on metal cans in the 5 or 10 pound sizes would not result in any additional business. Likewise, price reduction alone on the smaller 1½ or 2½ pound capacity cans would probably not result in any additional business." (GX 401, R. 2543, 1542).

"Under these circumstances, it appears unlikely that the mere offering of a new metal container to the widely scattered peanut butter industry would produce rewarding results, particularly in view of the industry's present dollar and market investment in glass containers and their filling and closing equipment." (GX 402, R. 2551, 847).

"In spite of the price advantage of glass, the majority of coffee roasters are anxious to use cans to as high a percentage as possible." (GX 406, R. 2579, 1543).

"The outstanding and major reasons for consumers preferring glass jars instead of metal cans for baby food is the deep seated belief that jars are completely sanitary containers which can be used in place of dishes for feeding and are also ideal for storing unused portions of food in a refrigerator while conventional cans are not suitable for either direct feeding use or storage of partial contents." (GX 417, R. 2632, 821).

"We do know there is a decided demand for non-returnable packages and this situation may influence the industry to accept smaller profit margins in order to meet consumer preferences." (GX 435, R. 2703, 628).

The district court properly found as a fact that the material relied on by the government did not show reasonable interchangeability or cross-elasticity of demand as between metal cans and glass containers generally (Op. R. 1642-43).

But there is a further infirmity inherent in the government's effort to delineate a line of commerce comprising "containers used for all purposes for which metal or glass containers may be used." If, contrary to the findings below, metal and glass containers are deemed to be reasonably interchangeable and to possess the requisite cross-elasticity of demand, there is no rational basis for stopping there. Any "overall line of commerce"[21] must also include, besides metal and glass, such other materials as paper, plastic and foil. Indeed, *the government concedes that "this overall line of commerce includes competition for the same end uses by other containers, such as paper, plastic and foil."*[22] The

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[21] Gov't Brief p. 18 n. 18.

[22] *Ibid.* (Emphasis added).

fact that "the further competition of such other industries prevents expression in market share percentages of the impact of this merger"[23] is no excuse for arbitrarily excluding these materials from the alleged line of commerce. As the government itself acknowledges, "the touchstone" to the problem of market definition is finding "'the area of effective competition'" (Gov't Brief p. 15). If glass and metal containers can be thrown into the same general inter-industry line of commerce, there is no warrant for excluding the other materials which equally belong there.

Referring to the *Cellophane* case, the government says: "Just as cellophane and Pliofilm were regarded in *duPont* to be competing packaging materials for meat packers and other packaging customers (351 U. S. at 399-400), so are glass and metal containers in competition in this case for the business of all users of such containers." (Gov't Brief p. 39). In making this statement, the government exposes the fundamental weakness of its position. This Court in *Cellophane* did *not* confine the relevant market to cellophane and Pliofilm; it held that the market consisted of *all* reasonably interchangeable flexible packaging materials—cellophane and Pliofilm being only two.

The government never claimed in the court below that glass and metal containers alone constituted a distinct product market, but included them in a general "packaging industry" line of commerce. This was the government's overall interindustry line, and it was never seriously pressed in the district court. It was rejected by the trier of facts, who said: ". . . there was complete failure of proof" (Op. R. 1618), and the government is not appealing from that determination. Its belated effort now to slice just two segments out of this multi-segment pie is an act of

[23] *Ibid.*

sheer expediency without a semblance of support in the record. By this maneuver it would brush aside all of the huge businesses selling substitute products and escape the embarrassment of dealing with paper milk containers; cracker boxes, breakfast food containers, frozen food paper boxes, composite oil cans and anything else that does not happen to fit within its neatly gerrymandered line of commerce.

To support its arguments with respect to this newly discovered line of commerce, the government leaps clear of the record in the case and announces (Gov't Brief p. 26):

> "As reflected in the *literature* on the metal and glass container industries, the two containers are functionally interchangeable and present alternatives to packers whose competitive choice between them has varied with the commodity to be packed, their comparative cost and other characteristics which affect the desirability of each." (Emphasis added).

For this proposition, it cites a series of obscure publications and several newspaper articles (Gov't Brief p. 26 n. 25). It bolsters its argument with a pronouncement from the elusive Hession, whom it did not dare expose to cross examination, that:

> "Competition which in the past had been merely potential became active and aggressive." (Gov't Brief p. 27).[24]

It also cites a statement made a quarter of a century ago, under unknown circumstances and in an unknown context,

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[24] For what it is worth, we quote the other of the government's favorite outside-the-record "witnesses" who, in discussing cans and glass containers, says flatly:

> "There is no one 'container market'. The markets are heterogeneous." McKie, *Tin Cans and Tin Plate* (1959) p. 295.

by a supplier of tinplate to the effect that in arriving at prices for tinplate:

> "other types of containers [kind unspecified] . . . always come into our discussions." (Gov't Brief p. 27).

Squarely opposed to this argument are the findings of the district court which, after commenting on the paucity of the testimony relating to interchangeability, found (Op. R. 1642-43):

> "It can scarcely be said that this testimony shows any general interchangeability of use or cross-elasticity of demand as between glass and cans. The fact that *in some instances* similar products were packaged in two or more different types of containers, or that at times one kind of container has supplanted another in the packaging of the same product, does not show that different types of containers are *generally* commercially interchangeable.
>
> "Choice of type of container in which to pack a particular product may be dictated by a variety of factors, including traditional or changing preferences of the buying public, eye appeal, the nature of the trade to be served, the physical characteristics of the product to be packed, the type of packing process required, distance to outlets, and other diverse factors. But the record is barren as to the extent to which specific factors of this nature affect the choice of metal or glass containers in which to pack the enormous varieties and kinds of food products included within the broad range claimed for this product market."[25] (Emphasis added).

[25] Many of the exhibits which the government cites to support its interchangeability theory refer to beer, with respect to which product, of course, the district court found that metal containers and glass containers did constitute a line of commerce. The government admits (Gov't Brief p. 30 n. 29) that Hazel-Atlas was not a significant factor in beer bottle production. The government's

The government's own expert witness presented evidence which the government admits (Gov't Brief p. 28) showed that "particular products may be packed predominantly in one of these containers, to the almost total exclusion of the other." The government would dismiss this evidence as overlooking "the dynamic nature of the competition between these two industries" (Gov't Brief p. 28).

The evidence in question was a comprehensive survey of how various products are packed, of how they actually move in commerce. This evidence cannot be dismissed lightly; it is the proof of actual usage, in contradistinction to all of the government's fine theories of mere possibility of usage. Here is what the government's expert found (DX-N, R, 3389-92, 955):

Ammonia	All or substantially all in glass.
Antiseptics	All or substantially all in glass in consumer size.
Baby Foods	80% glass; 20% cans.
Beer and ale	39% cans; 6½% non-returnable glass; balance returnable glass.
Brilliantines	All or substantially all in glass in liquid form and some collapsible tubes with different formulation.
Catsup	All or substantially all in glass in consumer size—Institutional all or substantially all in cans—plastic film or containers for individual servings—very small.
Cheese spreads	90% glass; balance aluminum tumblers, plastic tubes and film, collapsible metal tubes, foil, crocks and paper; no cans.
Chili sauce	All or substantially all in glass.
Cider	All or substantially all in glass.

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statement (Gov't Brief p. 29) that the development of the beer can prompted the production of cheaper and lighter weight non-returnable bottles is not supported in the record. It is obvious that important factors in this development were the reluctance of supermarkets to handle returnable bottles and the glass container industry's desire to sell twenty or more bottles where previously only one had been sold.

Citrus segments, chilled	All or substantially all in glass.
Citrus segments, non-refrigerated	95-100% cans.
Coffee, ground	Less than 1% in glass; balance in cans and paper bags.
Coffee, soluble	99% glass; 1% cans.
Cologne	95-100% glass — some aerosols of glass, metal and plastic.
Corn	All or substantially all in cans.
Corned beef hash	95% cans.
Cosmetic creams	90% glass; 5% plastic; 5% collapsible tubes.
Crabmeat	All or substantially all in cans.
Cranberry sauce	All or substantially all in cans.
Cream, whole	50% glass; 50% paper—no cans.
Cured ham	All or substantially all in cans.
Distilled spirits	All or substantially all in glass.
Drugs, ethical in liquid form	All or substantially all in glass.
Flavoring extracts	All or substantially all in glass.
Food sauces other than tomato sauce	All or substantially all in glass.
Fruit spreads and preserves	More than 95% in glass for home consumption.
Green beans	95% cans; 5% glass.
Hair lacquer	All or substantially all in metal.
Hair tonic	More than 95% in glass.
Hominy	All or substantially all in cans.
Horse radish	All or substantially all in glass.
Juices, concentrated and frozen	All or substantially all in cans.
Lard	All or substantially all in cans; a little paper.
Lighter fluid	90% cans—10% glass.
Lima beans	All or substantially all in cans.
Liquid bleach	All or substantially all in glass.
Liquid shoe polish	All or substantially all in glass.
Lubricating grease	All or substantially all in cans.
Luncheon meat	All or substantially all in cans.
Machine oil	Substantially all in cans.
Marachino cherries	All or substantially all in glass in consumer size.
Mayonnaise	All or substantially all in glass in consumer size.
Milk, whole	55% paper—45% glass.

Mineral oil	All or substantially all in glass.
Motor oil	All or substantially all in cans.
Mouth wash	All or substantially all in glass.
Mustard, prepared (consumer size)	95% glass—5% plastics.
Nail polish	All or substantially all in glass.
Nail polish remover	All or substantially all in glass.
Olives, green	All or substantially all in glass.
Olives, ripe	90-95% cans; balance glass.
Paint, oil base (household, interior and exterior)	None in glass.
Paint, polyvinyl acetate base (household, interior and exterior)	None in glass.
Paint, rubber base (household, interior and exterior)	None in glass.
Paste shoe polish	All or substantially all in cans.
Peaches	95% cans—5% glass.
Peanut butter (consumer size)	90% glass—5% plastic and 5% cans.
Pears	95% cans—5% glass.
Peas	All or substantially all in cans.
Perfume	All or substantially all in glass.
Pickles	Over 95% glass for household use—balance between cans and plastic film.
Pineapple	All or substantially all in cans.
Proprietary medicine in liquid form	95% glass—5% plastics.
Prune juice	All or substantially all in glass.
Pumpkin	All or substantially all in cans.
Relish (consumer size)	All or substantially all in glass.
Salad and cooking oils (consumer size)	85% glass; 15% cans.
Salad dressings	100% glass for retail.
Salmon	All or substantially all in cans.
Sardines	All or substantially all in cans.
Single strength blended orange and grapefruit juice	Over 95% cans.
Single strength grape fruit juice	90-95% cans; balance glass.
Soft drinks	98½% glass; balance cans (1% is one way bottle).
Solid and semi-solid shortening	All or substantially all in cans.

Soup (Liquid form)	All or substantially all in cans.
Squash	All or substantially all in cans.
Starch (Liquid form)	All or substantially all in glass.
Sweet Potatoes	All or substantially all in cans.
Syrup, chocolate	95% cans—5% glass.
Toilet water	All or substantially all in glass.
Tomato juice	Over 95% in cans.
Tomato paste	All or substantially all in cans.
Tomato puree	All or substantially all in cans.
Tomato sauce	All or substantially all in cans.
Tomatoes, stewed	All or substantially all in cans.
Tomatoes, whole	All or substantially all in cans.
Tuna fish	All or substantially all in cans.
Vinegar	All or substantially all in glass consumer size.
Wax beans	Over 95% cans—balance glass.
Wet pack pet foods	90-95% cans; balance glass.
Wine	All or substantially all in glass.
Writing ink	All or substantially all in glass except refill cartridges.

Far from overlooking anything, this is proof of how containers are actually used in the market place with all of its dynamism.

We call to the Court's attention that the plaintiff here is the United States, represented by the Department of Justice, and that it makes diametrically opposite arguments as expediency dictates.

On December 4, 1956, about three months after the action in this case was instituted, a complaint was filed by the government in the Northern District of Ohio attacking the acquisition of National Container Corporation by Owens-Illinois Glass Company as a violation of Section 7.[26] In that action the government made strenuous efforts to limit the line of commerce to glass containers. Toward that end, it served the following requests to admit, among others, on Owens-Illinois:

[26] *United States v. Owens-Illinois Glass Company*, Civil No. 7686 (N. D. Ohio).

"(23) While certain other materials may possess one or more of the characteristics of glass for container purposes, no other material possesses all of the qualities possessed by glass for container purposes."

"(54) Glass containers are recognized in the industry as being a product having peculiar and unique physical characteristics which distinguish them from containers made from other materials."

"(55) Glass containers are recognized in the industry as being a product having peculiar and unique utilization characteristics which distinguish them from containers made from other materials."

"(58) Although there are a number of products packaged both in glass containers and in containers made from other materials, there exists no substitute for glass containers which possess all of the several physical and utilization characteristics possessed by glass containers."

In a subsequent answer to a counter request to admit, the government stated:

"... *many, if not most, container uses require particular combinations of characteristics* (e. g., impermeability—rigidity—transparency) *not found in containers made of materials other than glass.*" (Emphasis added).

The government made a motion for summary judgment in the *Owens-Illinois* case. In its briefs in support of its motion, filed only about two years ago, it recognized that glass containers could not be combined with other containers to form a line of commerce. It told the district court in that case:[27]

[27] Brief for Plaintiff, p. 33, Reply Brief for Plaintiff, p. 43, *United States* v. *Owens-Illinois Glass Company*, Civil No. 7686 (N. D. Ohio).

"A number of products are packaged both in glass and in containers made from other materials. For specific customer demands which require particular combinations of characteristics possessed by glass containers, however, there is no substitute for glass containers."

"Defendant's [i.e. Owens-Illinois'] insistence on a glass-paper-tin-plastic 'consumer container' line of commerce without permitting recognition of what business and the public at large recognize as distinct products would, if adopted, emasculate the broad purposes of Congress in enacting Section 7."

We submit that facts are facts, and that the definition of lines of commerce should be made by the tests prescribed by this Court, not varied according to the theories of the government in its various cases. The lack of substitutability to which the government referred in the *Owens-Illinois* case was found to be a fact by the district court in the instant case.

That brings us to the government's proposed "food canning" line of commerce. When the government proposed this line of commerce prior to trial, it defined it as relating to containers for heat-sterilized and hermetically sealed foods. At the trial it limited this line to hermetically sealed foods, although some of the foods it claimed fell within this line were heat-sterilized but not hermetically sealed, some were hermetically sealed but not heat-sterilized, and some were neither. (See Op. R. 1639-40).

The government's confusion as to what it means to include within its "canning" line is complete. In its Pretrial Statement of proposed "Steps of Proof" it defined it as ". . . fruits, vegetables, juices and other foods which are heat-sterilized and hermetically sealed in cans and glass containers."

In oral argument on the motion to dismiss counsel for the government said (Tr. 4101, unprinted): ". . . when we attempted to define this in our answer to interrogatories, we attempted to define it in this manner, to explain what we were talking about and what we were trying to exclude, and the key thing is we were trying to include things which are hermetically sealed. *We used the words 'heat sterilization' because we are trying to get away from frozen food.*" (Emphasis added). In response to questions from the district court, government counsel said that candy and baking powder in screw top containers (i.e., containers which are not hermetically sealed) would be included. The district court then said (Tr. 4109, unprinted):

> "The Court: In other words, your contention now—I want to make sure I get this—your contention at the present time is that your line of commerce on food includes all foods that are packaged in tin or glass."

To this government counsel replied (*ibid.*):

> "That would be correct."

In an affidavit in support of a motion for reargument made just after the trial, government counsel said:

> ". . . our definition of the canning line included products which were not heat sterilized and in essence represented all foods which were put in hermetic containers." (McManus affidavit, December 21, 1960, p. 3, unprinted).

In the same affidavit (p. 5) government counsel said:

> "By its [the government's] direct examinations and by its documentary evidence it left no doubt that the 'canning' line included non-heat sterilized foods."

The district court dealt with this confusion in its opinion. (See Op. R. 1639-40).

On this appeal the government has reversed its position again, and it now would limit the line to foods which are both hermetically sealed and heat-sterilized (Gov't Brief pp. 13-14, 41).

The government now contends that one physical fact alone—the possibility of creating a hermetic seal on a container which can be heat-sterilized—is sufficient to create a line of commerce. It would ignore all other market factors which were shown at the trial to negative completely the existence of a line of commerce consisting of containers for canning.

A line of commerce consisting of containers for hermetically sealed and heat-sterilized foods is not known in everyday use and the evidence does not permit one to be discovered. The government's two experts did not recognize such a line. The government's food expert testified that food processing for glass packing was different from that for metal can packing; that packing techniques for different types of containers were different; that packing economies were different; that the equipment required was different; and that the physical characteristics of the two types of containers produced different packing results (R. 297-300, 305-07, 308-09). The government's other expert testified that specified products tend to move in containers of one type or the other but not in both (R. 951-53, 954-55; DX-N, R. 3389-92, 955).

In its brief (Gov't Brief p. 28) the government says that in the district court it produced the "most graphic evidence of the interchangeability of glass and metal containers—the fact that numerous products are packed in both types of containers." "Investigators", it says, "observed a great variety of goods being offered for sale *competitively*

at retail stores throughout the country in both glass and metal containers." (Emphasis added).

The reference is to certain products purchased by FBI agents in retail stores. So far from showing that the products were offered for sale "competitively", it was stipulated at the trial (R. 1160-61) that no attempt had been made to determine if the products were offered competitively. They are not the same products; they are not processed in the same way; and they are not priced competitively. A copy of the stipulation is annexed as Appellee's Appendix.

An examination of the examples of food products packed in both types of containers generally shows immediately what the differences were: green olives were packed in glass —ripe olives in cans; fruit preserves packed domestically were packed in glass containers—fruit preserves packed abroad and imported were packed in cans; tomato catsup in retail sizes was packed in glass containers—tomato catsup in institutional sizes was packed in cans.

In rejecting the government's food canning line of commerce, the district court specifically found, after an exhaustive review of the evidence, that there was "no showing of reasonable interchangeability of use or cross-elasticity of demand as between metal and glass containers used for packing food" (Op. R. 1641); that there was "no showing of any public or industry recognition of such a product market or submarket" (Op. R. 1640-41); that metal cans and glass containers do not have the same physical characteristics and uses in the food field (Op. R. 1641); that "their shapes, sizes and other characteristics differ widely, depending upon the type of food to be packed in them" (*ibid.*); that "the manufacturing equipment and processes and the raw materials for each, far from being interchangeable, are entirely different" (Op. R. 1643); that "the

machinery used to pack food products in glass containers and the packing process are different from that used for packing in metal cans" (*ibid.*); that "there was no evidence to show that the thousands of packers of food products who purchase metal cans or glass containers, or both, fall into any categories of distinct classes of customers" (*ibid.*); that there was no evidence of "a distinct price structure for metal cans and glass containers used for food products, or of correlation or correspondence of prices between them" (*ibid.*); and that "there are no specialized vendors of containers used for food products" (*ibid.*).

The district court, in short, went down the line of product market indicia outlined by this Court in *Brown Shoe*, and found the government's case deficient on each and every score. The government makes no showing that these findings were incorrect, much less clearly erroneous (Fed. R. Civ. P. 52(a)). It simply wants this Court to make its own *de novo* findings on the basis of the government's *ipse dixit*.

In addition to the detailed and comprehensive findings negating the government's canning line of commerce, the record shows that although Hazel-Atlas and Continental both sold their respective containers for food, they sold them for different uses.

The principal glass containers manufactured and sold by Hazel-Atlas for use as food containers were for use in packaging catsup, chili sauce, vinegar, syrup, salad dressing, jams, preserves, pickles, mayonnaise, maraschino cherries, olives and mustard (R. 359-60).

These products do not move in metal cans, except that a small amount of certain types of syrup is in cans. Catsup, chili sauce, salad dressing and mayonnaise in retail sizes are practically unknown in containers other than glass. The same is true of the other principal foods for which

Hazel-Atlas sold glass containers—vinegar, jams, preserves, pickles, maraschino cherries and mustard (DX-N, R. 3389-92, 955). Baby food containers, to which the government refers (Gov't Brief p. 45), was a use for which Hazel-Atlas's participation was negligible (R. 339), as the government admits (Gov't Brief p. 45 n. 46).

On the other side, the principal food products for which Continental sells its metal cans do not move in glass containers. Continental's largest food container lines are for fruits and vegetables, including juices (GX 800, R. 2887-88, 1490). Much of the fruit juice is packed concentrated in frozen form for which glass containers are not suitable. With respect to fruits and vegetables generally, cooking time, weight, appearance and other market factors militate so heavily against glass containers that in practice only small amounts of premium grades are packed in glass containers (R. 298-300, 470-71, 477-78; GX 317, R. 2337-81, 69; GX 318, R. 2382-2439, 71). In total, these are negligible (DX-N, R. 3389-92, 955).

Other major food products for which Continental sells metal cans are evaporated milk, fish and seafood, coffee, meat and lard and shortening (GX 800, R. 2887-94, 1490). Here also, for a host of different reasons, some applying to one product and some to another, these products are, and continue to be, packaged in cans. Sometimes it is weight, often it is appearance and very frequently it is the very nature of the processing to which the product is subjected which determines that a metal container is the only practicable container to use.

Upon all of this evidence the district court found no reasonable interchangeability or cross-elasticity of demand as between cans and glass containers for packaging food. This finding was clearly correct.

II.

The district court was correct in finding that there was no evidence of reasonable probability of anti-competitive effects resulting from the acquisition.

The district court construed the words "may be", used in Section 7 in defining the effect on competition of mergers, as the equivalent of reasonable probability (Op. R. 1579). There is no doubt that this is correct. The Senate Report on the bill which became Section 7 says, with respect to the words "may be": "The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect." (S. Rep. No. 1775, 81st Cong. 2d Sess. 6; *Brown Shoe*, 370 U. S. at 323).

Although the present case was tried more than four years after the acquisition, there was no proof of actual anti-competitive effects. The government does not dispute this.[28]

The inquiry then becomes one of the reasonable probability of the future development of anti-competitive effects where no such effects have developed in four years. "[T]he

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[28] During the pre-trial proceedings, the Antitrust Division of the Department of Justice wrote to counsel for appellee:

> "Judge Bryan, at the pre-trial conference of March 4, 1960, ordered the Government to state which of its witnesses would testify that they had received a specific injury as a result of the acquisition of Hazel-Atlas Glass Company by Continental Can Company, Inc.
>
> ". . . As of this date the plaintiff has no witness who will testify as to such specific injury. . . ." (Letter, dated March 17, 1960, from Robert A. Bicks, Acting Assistant Attorney General, Antitrust Division, Department of Justice, to Helmer R. Johnson (unprinted)).

No witness did so testify.

experience reflected by this post-acquisition period must weigh heavily in appraising future probabilities" *Consolidated Foods Corp.* v. *F. T. C.*, 1964 Trade Cases (CCH) ¶71,054, p. 79,168 (7th Cir. 1964).

Although it found no single line of commerce comprising all metal cans and glass containers, and no line of commerce consisting of containers for canning, the district court proceeded to make a very careful and complete appraisal of the effect of the acquisition in every direction, interindustry and intraindustry. Each of the areas in which the government contended that anti-competitive effects might arise was considered separately. The thoroughness of this study is indicated by the areas considered:

(a) Prior acquisitions (Op. R. 1610).

(b) Intention of the parties (Op. R. 1611).

(c) Likelihood of suppression of product lines (Op. R. 1611-12).

(d) Elimination of competition (Op. R. 1611-12, 1620, 1626).

(e) Weakening of either company in their respective lines (Op. R. 1611-12).

(f) Advantages resulting from the acquisition (Op. R. 1612-13, 1619-20, 1625-26).

(g) Concentration in the respective industries (Op. R. 1613-14).

(h) Changes in market position (Op. R. 1614).

(i) Effects on competitors (Op. R. 1615).

(j) Ease of entry into industries involved (Op. R. 1620, 1623).

(k) Tendency toward monopoly (Op. R. 1622-23).

This careful inquiry yielded nothing to show a reasonable probability that the acquisition would have the pro-

hibited anti-competitive effects. There was a total failure of proof that this interindustry merger was likely to adversely affect competition in either industry or in any other line of commerce.

From the mere existence of interindustry competition in general in the sale of cans and glass containers, and the position of Continental and Hazel-Atlas in their respective industries, the government argues that an inference should be drawn that the effect of the acquisition may be substantially to lessen competition (Gov't Brief pp. 24, 52). Here the government seizes upon half a sentence in *United States v. Philadelphia National Bank*[29] and tears it out of context.

The factual situation in *Philadelphia Bank* was completely different from that in the present case. There, both parties to the merger were direct competitors in the same line of commerce (commercial banking), so the merger was plainly a horizontal one. The merger would have produced a bank controlling an undue percentage of the relevant market and would have significantly increased the high degree of concentration that already prevailed in an industry which had witnessed a decline in the number of competitive units. It was in this context that the Court made its comments with respect to the inherent likelihood of the effects of that merger. There is no parallel whatever between the *Philadelphia Bank* case and the merger at issue here, which involves diversification by one company into a new product line.

What the government is saying here in essence is that two large companies, which are important factors in their respective industries,[30] cannot merge if there is interindus-

[29] 374 U. S. 321, 365 (1963).

[30] The government loosely characterizes Continental and Hazel-Atlas as "dominant" firms in their industries. Needless to say, Continental does not dominate an industry in which American Can is the front-runner; nor does Hazel-Atlas dominate an industry in which it trails behind Owens-Illinois and Anchor Hocking.

try competition—wholly apart from either the quantity or quality of such competition, and wholly apart from the roles played by the two companies in that competition. Thus, it is enough for the government that glass and metal containers compete in a general sort of way for some common end uses, and that Hazel-Atlas made glass containers and that Continental made metal containers.

But to what extent do glass and metal containers compete? For which end uses? How important are these end uses in the overall scheme of things? What is the nature and quality of the interindustry competition? In those areas where glass and metal containers can be said to compete, was Hazel-Atlas competing with Continental, and, if so, to what extent?

These are not idle questions. They were considered and answered by the district court. They go to the heart of any meaningful determination of probable anti-competitive effects under Section 7. Yet the government sweeps all these questions under the rug and comes up with a rule of virtual automatic illegality which has no relationship to the realities of the marketplace.

The government oversimplifies. It would treat the merger of a metal container and glass container company in the same way that it would treat the merger of two metal container companies or two glass container companies. It draws no distinction between peripheral interindustry competition and direct intraindustry competition. Manifestly, an attempt by a metal container company to create a can which could be sold for peanut butter, where cans are not now being used to any appreciable degree, is not the same type of competition as that waged among glass container companies going after the same peanut butter business.

We wish to emphasize that we do not contend that evidence of precise market shares is indispensable to proof of a Section 7 violation. It was the government which chose to present a statistical case here. And now that its statistics are deficient, it wants to forget about them. That, of course, is the government's privilege. But when it throws its statistics away and has nothing left, it should not be heard to say that nothing is good enough. The tailor-made rule that it has proposed in this Court for the first time obviates not only the need for statistical proof, but for any proof whatever on the issue of competitive effects.

The government is guilty of the same oversimplification when it comes to its "food canning" line of commerce. It cavalierly assumes, contrary to the evidence, that inter-industry competition *between* metal and glass containers for packaging food products is comparable to competition *within* each of these industries for such packaging purposes. An illustration will serve to point up the fallaciousness of this assumption. Sardines and mayonnaise are both food products. But sardines traditionally move in metal cans, and the housewife traditionally buys mayonnaise in glass containers (DX-N, R. 3389-92, 955). When the metal can manufacturers vie for the custom of a canner who is packing sardines, they most certainly are competing head-on. The same holds true where two glass container manufacturers solicit the patronage of the mayonnaise packer. But would anyone say that in this instance the two metal-can manufacturers are competing with the two glass container manufacturers simply because all four are going after the business of food canners?

The fact of the matter is that to the extent that inter-industry competition exists between glass and metal containers for food canning, it is not the same either qualitatively or quantitatively as the competition that exists within

each of these industries. Hence, even if the government's statistics and statistical assumptions were to be accepted at face value (we demonstrate their utter unreliability in Point III, below), they would not rationally support an inference that the challenged acquisition is reasonably likely to produce the prohibited anti-competitive effects. In other words, if we assume with the government, *arguendo*, that Continental had about 23% and that Hazel-Atlas accounted for approximately 3% of the claimed interindustry "food canning" line of commerce, this would not constitute a *prima facie* violation. We would say that a 3% accretion would not be enough for this purpose under the *Philadelphia National Bank* formulation even if a horizontal merger of direct competitors were involved.[31] *A fortiori*, it is not enough when all that is involved is peripheral interindustry competition.

It is interesting to note that although the government originally contended that the acquisition would substantially lessen competition within both the glass container and metal container industries, it is not appealing from the district court's determination that no such probable anti-competitive effects were shown with respect to either of these lines of commerce. The government, accordingly, is in the position of accepting the finding that intraindustry competition will not be adversely affected by the acquisition, and yet at the same time arguing that interindustry competition will be.

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[31] A 3% increase would not, we submit, produce "a firm controlling an undue percentage share of the relevant market;" nor would it result in "a significant increase in the concentration of firms in that market." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 363 (1963). The incremental percentage in the *Philadelphia National Bank* case was several times as large.

III.

The government's statistics are unreliable and provide no basis for measuring shares of any market.

Although the government deprecates reliance on statistics it uses many of them in its brief in an attempt to show what Continental's and Hazel-Atlas' positions would have been if metal cans and glass containers for foods or for canning could have been combined into a single product market from which all other types of containers were excluded.

Its statistical methodology is such, however, that each figure it uses must be examined with care. The record shows that they are false. The district court found that many of the government's statistical combinations "have no sound statistical basis and are predicated on implausible hypotheses not supported by evidence." (Op. R. 1614). The government does not contest this finding; it tries to ignore it.[32]

It is never easy to demonstrate the falsity of statistics, but the record in this case is such as to permit it to be done.

In the first place, the metal can and glass container industries are so different that they do not use a common system of statistical notation. The can industry reports to the Census Bureau in terms of the amount of tinplate consumed; the glass industry in terms of units, by end use categories, shipped. At the trial the government witness presenting its statistics testified that he had never heard of combined figures (R. 1281). He had set about to make his own combinations.[33]

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[32] In its brief the government contents itself with saying that it explained its computations at the trial (Gov't Brief p. 50 n. 50). It was in response to this explanation that the district court made its finding that they were "predicated on implausible hypotheses".

[33] He was not a qualified statistician (R. 1231-32).

In an attempt to convert the tinplate use to units of metal cans, the government took a series of figures from the can industry's trade association which were clearly marked as the hypothetical number of cans which could have been made from the amount of tinplate consumed.[34] These figures were never used by the trade association without being clearly marked as hypothetical. They were admittedly made without regard to product mix, which the record shows varies greatly from company to company, and by making certain undisclosed assumptions with respect to size of cans and weight of tinplate used in making metal cans (R. 1275-79; GX 800, R. 2937-47, 1490).

From the trade association's hypothetical figure the government computed an assumed conversion factor (one never used by the trade association—R. 1307-08) which it applied to the Census Bureau figures of total tinplate consumed in the making of cans of all sizes and shapes. No attempt was made to allow for variations in sizes of cans, which obviously vary widely.

Using the method described, with its clearly erroneous assumptions, the government then had a figure which it called the total number of units of cans manufactured. To this it added the total number of units of glass containers shipped, counting each unit as one although the record shows that great numbers of the glass containers were returnable bottles used on an average of twenty-two times each (R. 1015-16). The Census Bureau has, for obvious reasons, always carefully separated returnable from non-returnable bottles (R. 1282-83). The largest category of returnable bottles is beer bottles. Since Hazel-

[34] In response to an interrogatory to the government with respect to these figures, it said: "[T]he plaintiff has no way of verifying their accuracy." (DX-X, R. 3401, 1495).

Atlas' production of beer bottles was negligible, the distortion was extremely large.

To this artificially constructed universe figure the government applied Continental's usage of tinplate, similarly converted into hypothetical units, and Hazel-Atlas' production of units of glass containers, to get a percentage of the total. This percentage was carried out beyond the decimal point to give an appearance of exactitude.

The percentage figures have no relationship to reality. They are false.

At the trial the government attempted to construct figures showing Continental's and Hazel-Atlas' share of containers used in "food canning." It now recognizes that it failed in this (Gov't Brief pp. 49-52), but it proposes a totally unfounded assumption that the proportion would be the same as the proportion of the whole. Even if the stated proportion of the whole were reliable, which it clearly is not, this assumption would be untenable for the product mix of each of the two companies was entirely different from the rest of their respective industries.[35]

The government, recognizing the weakness of its statistics, says that in any event they are "accurate enough"

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[35] The absurdity of the "inference that leading producers in each of these industries were able to sell their products in roughly equal shares among the major possible end uses because of the flexibility of manufacture and use" (Gov't Brief p. 51), can be demonstrated in another way. The same logic would support the inference that Hazel-Atlas produced beer bottles and milk bottles in the same proportion as its percentage of the glass container market. Yet the record shows that it produced a negligible number of beer bottles and no milk bottles (R. 354-55; GX 801, R. 2959, 2970, 1465, 1489; GX 800, R. 2884, 1490).

In its reply brief in the *Owens-Illinois* case, referred to above (p. 30), the government itself, citing *Crown Zellerbach Corp.* v. *F. T. C.*, 296 F. 2d 800, 812 (9th Cir. 1961) *cert. denied*, 370 U. S. 937 (1962), labelled the production flexibility theory, which it here advocates, an "absurdity."

(Gov't Brief p. 50). They are neither accurate nor accurate enough for any purpose, because they are based on inherently unsupportable assumptions. We are fully mindful of this Court's observation that "in cases of this type precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962). So was the court below. The trouble with the government's statistics is not merely that they are imprecise; the trouble is that they are meaningless.

As a last resort, the government begs to be allowed to use its statistics "if Section 7 litigation is to remain manageable" (Gov't Brief p. 49). The exigencies of litigation are, we submit, no justification for the use of made-to-order, tailored statistics which are palpably false, misleading and unreliable.

Conclusion.

In an extremely conscientious examination of the law and the facts the district court found that there had been a failure to prove any violation of Section 7. The appeal presents no questions of law for this Court's review. This is a fact case pure and simple. The government would have this Court examine *de novo* a large record compiled in a lengthy pre-trial and trial, and make new findings in place of those made by the trier of facts, who spent large amounts of time over a period of several years in their preparation. Under Rule 52(a) those findings cannot be set aside unless they are clearly erroneous. No such showing has even been attempted, much less made, here.

The situation here is comparable to that in *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949) in which this

Court, in refusing to retry an antitrust case, concluded at 340-41:

> "The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."

The judgment of the district court should be affirmed.

Respectfully submitted,

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April 17, 1964.

Appellee's Appendix.

(Stipulation—R. 1160-61).

The plaintiff stipulates that if the remaining FBI witnesses which it will call to testify were cross examined with respect to the following matters each of them would answer substantially as follows:

That he had never been employed by a can manufacturer, a glass container manufacturer, a plastic container manufacturer or a firm engaged in conducting surveys or polls of public opinions or consumer preference, and that he is not experienced in the techniques of such polls or surveys;

That he has never been employed by a packer who uses any of the kinds of containers that he observed during the course of his assignment;

That he has not been in communication with any of the packers whose products he has stated that he observed;

That he is not a chemist;

That he does not know the difference between high-density and low-density polyethylene, nor the difference between either of them and polystyrene;

That he took no note of and made no list of products in the stores which he visited which were packed in only one type of container;

That he took no note of and made no record of prices of the products which he observed;

That he took no note of and made no record of the quantities of products in the containers he observed;

That he took no note of and made no record of the quality of the products in the containers he observed;

That he took no note of and made no record of the differences in the preparation of the products in the containers he observed;

That he could not say whether the products which he observed were specially packed for special purposes, such as, for example, dietetic purposes;

That he did not know whether any of the products which he observed were processed by heat sterilization;

That he made no observation as to the amount of shelf space devoted to the different types of containers used to package what he considered to be similar products;

That he has no information as to the quantities of any of the products which he observed in inventory in any store, or as to the quantities sold in any store in any period of time, or as to the quantities sold in the metropolitan area of the community in which the observations were made, or as to the quantities sold in the United States at any time;

That he has no information with respect to the formulation of any of the products which he observed to be packaged in cans or glass or plastic;

That he did not notice whether any of the products which he observed were packaged locally or at a distance;

That he could not tell from the package of any article which he observed whether or not it was being test-marketed, or whether or not it was obsolete stock, or whether or not it had been packed as an experiment, or whether or not it was on special sale on the date of the observation;

That he couldn't tell from the package of any article which he observed whether or not the packager who packaged it is still packing in the same type of container;

That he could not tell from the package of the products that he observed or from any other source why the packer chose the particular type of package for the product;

That in the case of stores whose principal business is the sale of foods, he noticed that they carried fresh fruits and vegetables, fresh meats and fresh dairy products, that they carried frozen foods and foods in dried or dehydrated forms, but that he made no particular observations as to what the particular products were;

That he has no information as to the method of processing the various products he observed and no information as to the method of filling the containers he observed.